IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. .

SANA LABORATORIES, INC., JAMES A. IORIO and EDWARD JAMES IORIO,

Petitioners,

vs.

THE UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR PETITIONERS.

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(See R. 1 for title in Court below. Title given conforms to record printed by Clerk of this Court.)

BRIEF FOR PETITIONERS.

Opinions Below.

An opinion was rendered in this proceeding by Judge Guy L. Fake, of the United States District Court of New Jersey, on March 25th, 1940 (R., p. 5). An opinion was rendered on November 6th, 1940 in the United States Circuit Court of Appeals for the Third Circuit, in this cause by Hon. Herbert F. Goodrich, Circuit Judge, affirming order below, but for reasons stated in that opinion (R., p. 35). Neither of these opinions have been reported.

Basis of Jurisdiction.

This Court's jurisdiction to entertain the petition for certiorari presented and grant same is based upon the provisions of Judicial Code Section 240 (a), 28 U. S. C. A.

Section 347 (a). The proceeding involves the application and interpretation of the Fourth and Fifth Amendments to the Constitution of the United States in connection with a factual situation which petitioners herein charge entitles them to relief against an unlawful search and seizure by Agents of the United States Treasury Department. The judgment of the Circuit Court of Appeals for the Third Circuit was rendered on November 6th, 1940. A petition for rehearing was presented to the said Court within fifteen days after November 6th, 1940, which petition was denied on December 2nd, 1940. The judgment below affirmed an order of the District Court for the District of New Jersey, ordering the return of the seized papers and records but denying the suppression of information obtained from them as evidence in criminal proceedings against the petitions. Petitioners seek the type of relief given in *Go-Bart Importing Co., etc., et al.* v. *United States,* 282 U. S. 344, *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385, *United States* v. *Lefkowitz,* 285 U. S. 452. They respectfully contend that the decision of the Circuit Court of Appeals conflicts with the above cited decisions of this Court which it is urged are properly applicable in this case.

Statement of the Case.

The facts have been stated in the petition but for convenience the facts as stated by Circuit Judge Goodrich, delivering the opinion of the Court below, are now repeated here (R., p. 36).

> "This is an appeal from a denial of a petition praying for the suppression of certain evidence alleged to have been illegally seized by government agents. The petition was filed on behalf of Sana

Laboratories, Inc., a permittee authorized to withdraw specially denatured alcohol used by it in the preparation of medical and chemical products, and on behalf of James A. Iorio and Edward J. Iorio.

"On Friday evening, November 6, 1936, an investigator of the Alcohol Tax Unit who had been watching Sana's plant followed and seized a truck which had taken on six drums of alcohol at the plant. The serial numbers had been removed from these drums. The next morning he returned to the plant with other agents and they were all admitted by the janitor. The agents on that day took from the plant the manufacuring records and purchase and sales books and placed under arrest several persons. The agents had no warrant either for the arrests or the seizure of the documents. The persons arrested were brought before a commissioner later that day and were released on bail that night. On the Monday following the agents returned to the plant and collected invoices covering materials used in the manufacture of preparations containing alcohol and certain sales records. These records were placed in a sealed box and were removed from the premises by the agents on the next day.

This petition was filed in the court below on December 3, 1936. Affidavits were filed by both sides and hearing was held. On June 10, 1940 the court below entered its order denying the prayer of the petition. In the meantime, an indictment was returned on March 31, 1938 against Sana Laboratories, Inc. and certain individuals, including James A. Iorio and Edward J. Iorio, charging a conspiracy to defraud the United States of tax."

It was the testimony of petitioner, Edward J. Iorio, that not only were invoices and papers taken by the seizing officers which concerned the use of alcohol but invoices re-

lating to other phases of the business were removed from the premises (R., p. 51, fol. 21).

The right of the seizing officers to inspect the premises was limited to the right to inspect the operation of the plant during usual business hours and to inspect the manufacturing records and certain other records and invoices. This authority was derived from Articles 148 and 167 of Regulations 3, of the Bureau of Industrial Alcohol, U. S. Treasury Department, then in effect (See Appendix, p. 29, etc.).

The crux of the opinion of the Court below is set out in the following paragraph:

> "The government officers, then, clearly had the right to inspect the books and records and use information gathered therefrom. *If the subsequent seizure and removal from the premises were unlawful because the petitioners were entitled to the possession of the documents, this wrong has been cured by the return of the papers under the order rendered by the trial court.* But the removal from the premises of papers which government agents were, under the circumstances, entitled to inspect upon the premises did not render sacrosanct information secured from these papers because it was lawfully open to the government. It is only knowledge gained by the government's own wrong which cannot be used. Silverthorne Lumber Co. *v.* United States, 251 U. S. 385, 392 (1920)." (Italics by counsel.)

This conclusion it is respectfully contended is logically unsound and is really in conflict with the opinion of this Court in *Silverthorne Lumber Co* v. *United States, supra,* and the opinion of the court in *Kraus* v. *United States,* 270 Fed. 578 (D. C. S. D. N. Y., 1921), cited with approval by this court in its opinion in *Go-Bart* v. *United States, supra.*

Summary of Arguments.

I. The seizing officers had no lawful right to seize the records and papers involved without a search warrant.

II. The seizing officers became trespassers *ab initio* by abusing the authority given them by unlawfully seizing the records and papers on the permittee's premises.

III. The records and papers involved having been unlawfully seized, the use of them, or information obtained from them, in proceedings against the petitioners should be suppressed.

IV. The seized records and papers were not taken by consent.

V. The decree in the libel proceedings adjudicating the return of the alcohol seized on the permittee's premises on November 6, 1936, was *res adjudicata* on the question of the unlawfulness of the search and seizure.

ARGUMENT.

POINT I.

The seizing officers had no lawful right to seize the records and papers involved without a search warrant.

The authority of the government agents to enter the premises of the permittee involved herein was derived from the regulations cited in the foregoing petition which have the operation of law (See appendix, p. 29). Inasmuch as these provisions are in derogation of the rights reserved under the Fourth and Fifth Amendments, they must be strictly construed. The case of *Kraus* v. *United States,* 270 Fed. 578 (D. C. S. D. N. Y.), opinion by Judge

Hand, is one concerning an entry into permit premises by government agents. The well considered opinion therein has been cited by this Court in the case of *Go-Bart Importing Co. etc., et als.* v. *United States,* 282 U. S. 344. In the *Kraus* case, *supra,* the searching and seizing officers sought to justify their acts by the right of inspection given by the terms of a permit conditioned as in the case *sub judice.* In dealing with this contention, Judge Hand said:

> "It is quite true that the officers had the right to inspect the records, and therefore, the right to enter the place where they were kept. I shall for argument's sake further assume that, if the records were kept as required, they had the right to inspect such other papers on the premises as recorded transactions which should have been transcribed into the records. It does not, however, follow from these concessions, that they had the right to break and enter, though the petitioners wrongfully refused to allow them to inspect, nor does it either follow that they had the right to seize the records and papers after an inspection.
>
> "To take up the last first, it is clear that the right to inspect did not give the right to seize, and this is enough to require a return of the papers, though not of any copies taken or of any other information obtained from their custody. Since Silverthorne Lumber Co. *v.* U. S., *supra,* and Weeks *v.* U. S., *supra,* this right to return copies in the hub of the case. * * *"

The court below in its opinion held that whatever wrong may have been done the petitioners by these unlawful seizures and removal from the premises was cured by the return of the papers under the order rendered by the trial court. It would seem therefore, that there is no real controversy about the soundness of the proposition

that the papers and records were unlawfully seized and it is only the consequences of such unlawful seizures which require further consideration.

POINT II.

The seizing officers became trespassers *ab initio* by abusing the authority given them by unlawfully seizing the records and papers on the permittee's premises.

In the court below emphasis was laid on the proposition that in the instant case there was no unlawful entry. The asserted absence of that element in this case was the point in distinction asserted as rendering inapplicable, the rule expressed in the case of *Kraus* v. *United States, supra.* It is respectfully submitted, however, that by so doing the learned Judge overlooked the fundamental principle laid down in the *Six Carpenters'* case (1610) 8 Coke 146a, 77 Eng. Reprint 695, wherein it was said:

> * * * "it was resolved when an entry, authority or license is given to anyone by the law, and he doth abuse it, he may be a trespasser *ab initio;* * * *."

Thus it is respectfully contended that the unlawful seizures of the papers and records and the arrests without warrant of persons on the premises constituted an abuse of the authority to inspect and the acts of the seizing officers in so doing made them trespassers *ab initio.* It follows therefore that their entry upon the premises may properly be construed as an unlawful entry and tantamount to a breaking and entering into the premises. This reasoning would bring the instant case clearly within the rule laid down in the case of *Kraus* v. *United States, supra.*

POINT III.

The records and papers involved having been unlawfully seized, the use of them, or information obtained from them, in proceedings against the petitioners should be suppressed.

In the opinion rendered by the court below, the case of *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385 was cited by the court in support of the proposition that the information secured from the seized records and papers was not sacrosanct because it was lawfully open to the government upon inspection. It was said in the instant case by Circuit Judge Goodrich, *inter alia*:

> "The government officers, then clearly had the right to inspect the books and records and use information gathered therefrom. *If the subsequent seizure and removal from the premises were unlawful because the petitioners were entitled to the possession of the documents, this wrong has been cured by the return of the papers under the order rendered by the trial court.* But the removal from the premises of papers which government agents were, under the circumstances, entitled to inspect upon the premises did not render sacrosanct information secured from these papers because it was lawfully open to the government. It is only knowledge gained by the government's own wrong which cannot be used. Silverthorne Lumber Co. *v.* United States, 251 U. S. 385, 392 (1920)." (Italics by counsel.)

It is respectfully urged that this represents a misapplication of the principle laid down in the *Silverthorne Lumber Co.* case, *supra.* In that case a corporation was involved. As in the case at bar, its premises were invaded by government agents without a search warrant. They arrested vari-

ous officers of the corporation and after they had removed them from the premises, proceeded with an exploratory search as result of which they obtained a number of documents, books of account, records and papers, which they took into custody and examined. This action was challenged in the United States District Court. As a result, the court made an order directing the return of the originals and impounded photographs and copies of them as well. In Grand Jury proceedings, involving the corporation and its officers, a subpoena *duces tecum* was issued for the original documents, using the information obtained as a result of this search to determine what would be required. The Corporation and the individual defendants refused to produce the papers and were brought before the District Court on contempt charges. The corporation was found guilty and fined $250.00 and the individuals were sentenced to prison. Mr. Justice Holmes, speaking for the Supreme Court, severely criticized this procedure. He said *inter alia*:

> "The proposition could not be presented more nakedly. It is that although of course its seizure was an outrage which the government now regrets, it may study the papers before it returns them, copy them, and then may use the knowledge that it has gained to call upon the owners in a more regular form to produce them; that the protection of the Constitution covers the physical possession but not any advantages that the government can gain over the object of its pursuit by doing the forbidden act. Weeks *v.* United States, 232 U. S. 383, to be sure, had established that laying the papers directly before the grand jury was unwarranted, but it is taken to mean only that two steps are required instead of one. *In our opinion such is not the law. It reduces the 4th Amendment to a form of words.* 232 U. S. 93. The

essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court, but that it shall not be used at all. Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the government's own wrong cannot be used by it in the way proposed. The numerous decisions, like Adams *v.* New York, 192 U. S. 585, holding that a collateral inquiry into the mode in which evidence has been got will not be allowed when the question is raised for the first time at the trial, are no authority in the present proceeding, as is explained in Weeks *v.* United States, 232 U. S. 383, 394, 395. Whether some of those decisions have gone too far or have given wrong reasons it is unnecessary to inquire; the principle applicable to the present case seems to us plain. It is stated satisfactorily in Flagg *v.* United States, 233 Fed. 481, 483. In Linn *v.* United States, 251 Fed. 476, 480, *it was thought that a different rule applied to a corporation, on the ground THAT it was not privileged from producing its books and papers. But the rights of a corporation against unlawful search and seizure are to be protected even if the same result might have been achieved in a lawful way.*" (Italics by counsel.)

The case of *Go-Bart Importing Co.* v. *U. S.*, 282 U. S. page 344, *supra,* follows closely the reasoning of the *Silverthorne* case. A corporation and two individuals were involved. The court plainly declared that the evidence unlawfully obtained must be suppressed, as to both the corporation and the individuals.

In the instant case, great stress was laid by the court below upon the asserted absence of an unlawful entry into

the permit premises. This objection, it is respectfully argued, has already been met by the application of the doctrine of trespass *ab initio*. However, if it be conceded, but not admitted, that this doctrine is inapplicable, nevertheless, in the leading case of *Boyd* v. *United States*, 116 U. S. 616, this court clearly points out the breaking of doors and the forcing of entries are not vital factors. Mr. Justice Bradley, delivering the opinion of the court in that case said *inter alia* at page 630:

> "The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions, on the part of the Government and its employees, of the sanctity of a man's home and the privacies of life. *It is not the breaking of his doors and the rummaging of his drawers that constitutes the essence of the offense;* but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offense; it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment. Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods is within the condemnation of that judgment. In this regard the Fourth and Fifth Amendments run almost into each other." (Italics by counsel).

and again at page 635:

> "* * * Though the proceeding in question is divested of many of the aggravating incidents of

> actual search and seizure, yet, as before said, it contains their substance and essence, and effects their substantial purpose. It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely: by silent approaches and slight deviations from legal modes of procedure. *This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against stealthy encroachments thereon. Their motto should be obsta principiis."* (Italics by counsel.)

It is not amiss to repeat at this point the language of Mr. Justice Holmes in *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385 at page 392, which is in part:

> "* * * The essence of a provision forbidding the acquisition of evidence is that not merely evidence so acquired shall not be used before the court, but that it shall not be used at all. * * *"

It is submitted that the permit system contemplated no greater invasion of the permit holder's rights than that an inspection authorized by the regulations be allowed, and the denial thereof no greater penalty than a revocation of the Sana permit. See Art. 167 (Appendix, p. 29). The government was secured against loss of revenue by a substantial bond, which bond was conditioned upon compliance with the regulations. If there was to be a seizure, it could only be made on probable cause and by search warrant, in con-

formity with the Espionage Act. The case resembles in principle, *Taylor* v. *United States,* 286 U. S., page 1. The opinion of the court in that case declares in part:

> "* * * the agents had made no effort to obtain a warrant for making a search. They had abundant opportunity so to do and to proceed in an orderly way even after the odor had emphasized their suspicions; there was no probability of material change in the situation during the time necessary to secure such warrant. Moreover, a short period of watching would have prevented any such possibility.
>
> "We think, in any view, the action of the agents was inexcusable and the seizure unreasonable. The evidence was obtained unlawfully and should have been suppressed. See Carroll *v.* United States, 267 U. S. 132, United States *v.* Lefkowitz, decided April 11, 1932, 285 U. S. 452, ante, 877."

It is therefore respectfully urged that for the reasons given above, the court below erred in deciding that the use of the seized records, papers and information obtained therefrom in proceedings against the petitioners should not have been suppressed.

POINT IV.

The seized records and papers were not taken by consent.

There was no factual controversy in this proceeding except upon the contention by the government agents that the records and papers were taken by consent (R., p. 53, fol. 25) and the insistence by government agents in describing the arrests which they made as "detention" (R., p. 52, fol. 22).

The District Court based its denial of the relief prayed for by the petitioners on the ground that consent was given to the taking of them (See opinion R., at p. 7).

The Circuit Court of Appeals evidently preferred to rest its affirmance of the order of the District Court on another ground, for it made no mention in its opinion of the District Court's finding of consent. This point is mentioned here because it may be suggested in a reply brief.

Both Dr. Iorio and Edward James Iorio who were alleged to have been the persons giving consent testified that no consent was given (See R., p. 49 to p. 51, fols. 17, 18, 19, 20 and 21). It is argued for the petitioners that peaceful submission to the demands of law officers or acts done under protest could not be construed as consent, and there was a presumption of implied coercion which was recognized and applied in such cases by this Court. See *Amos* v. *United States,* (1921) 255 U. S. 313, and *Re Tri-State Coal and Coke Co.* (1918 D. C.), 253 Fed. 605.

It is respectfully urged that the element of consent or permission is not present in this case.

POINT V.

The decree in the libel proceedings adjudicating the return of the alcohol seized on the permittee's premises on November 6, 1936, was *res adjudicata* on the question of the unlawfulness of the search and seizure.

In the case of *Hipolite Egg Co.* v. *United States,* 220 U. S. 45, there was involved a proceeding *in rem* for forfeiture and condemnation of adulterated eggs. The corporation appeared as claimant. The Court held that by reason of the filing of a claim, jurisdiction was acquired over the

person of the egg company. (See last line of the opinion on page 60.)

In the leading case of *Coffey* v. *United States,* 116 U. S. 436, it was held, *inter alia*:

> "A judgment of acquittal in a criminal prosecution for a violation of the internal revenue laws, is conclusive in favor of the defendant, as claimant, of the property involved in a subsequent suit *in rem,* when, as against him, the existence of the same act or fact involved in the criminal prosecution is in issue as a cause for the forfeiture of such property."

In the case at bar, a libel of condemnation was filed against 17 drums of alcohol seized on the permittee's premises on November 7, 1936, being the same day upon which certain of the records and papers herein involved were seized by the government agents. When this matter came before the District Court, a decree was entered dismissing the libel on the third and fourth counts thereof, which counts involved the 17 drums of alcohol above mentioned. The libel is set forth in R., page 25. The docket entries in this proceeding are set forth in R., page 13 and the decree of forfeiture therein is set forth in R., page 10. In that decree, it is recited, *inter alia,*

> "* * * it appearing that there is not sufficient evidence to warrant the forfeiture of the articles listed under the third and fourth counts of the libel. * * *"

It is respectfully contended that this decree was binding, not only upon the parties to that proceeding, but to their privies as well. That the seizure of the alcohol was a part of the transactions involved in the seizing of the

books and papers and that this decree renders *res adjudicata* the question of the unlawfulness of the seizures.

Conclusion.

In conclusion it may be pertinent to advert to the opinion of Circuit Judge Coxe in *Flagg* v. *United States,* 233 Fed. 481, in speaking of the Fourth and Fifth Amendments to the constitution in which he said *inter alia:*

> "These amendments were intended to safeguard the rights of the people of the United States against the encroachments of unlawful and arbitrary power and to preserve the rights of the humblest as well as the most powerful citizen. They were passed to perpetuate in our law the English doctrine proclaimed by Sir Edward Coke and eloquently reasserted by Chatham in his memorable address on the Excise Bill, as follows:
>
> > 'The poorest man may in his cottage bid defiance to all the forces of the crown; it may be frail, its roof may shake, the wind may blow through it; the storm may enter, the rain may enter; but the king of England cannot enter; all his forces dare not cross the threshold of the ruined tenement.'
>
> "What becomes of this defendant, important as it is, sinks into insignificance when compared with the right of the people of the United States to be protected from unlawful search."

In the instant case, while the petitioners herein may be of comparative insignificance and their cause, one of no great consequence to any one but themselves, still, the effect of the decision of the Court below is of great importance because it may result in placing a limitation on the

right of the people of the United States to be protected from unlawful search and seizure.

It is respectfully submitted that the prayer of the petition herein be granted.

Respectfully submitted,

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